IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, *Petitioner,*

v.

CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York, *Respondent.*

On Writ of Certiorari to the Appellate Division of the Supreme Court, First Judicial Department in the County of New York

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No. 290

JAMES T. STEVENS, *Petitioner,*

v.

JOHN J. McCLOSKEY, Sheriff of New York City, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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CITATIONS

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REPLY BRIEF FOR PETITIONER

In reply to certain contentions advanced in the Respondents' Brief, petitioner submits the following:

1. This Court May Appropriately Exercise Its Jurisdiction to Consider the Constitutional Question as to Which Certiorari Was Granted

The respondents continue to urge that the constitutionality of Article 1, Section 6, of the State Constitution and of Section 1123 of the City Charter "was never drawn in question by the decisions of the courts below in either case, and hence the [constitutional] issue is not properly before this Court." Brief, p. 17. Reference is made in this respect to the fact that the courts below all felt that this Court's decision in *Regan* v. *New York,* 349 U.S. 58, was controlling and that the question as to the constitutionality of the provisions in question need not be resolved.

Such a contention misconceives both the nature of this Court's jurisdiction to consider the federal constitutional validity of state law provisions and the appropriateness of exercising that jurisdiction in this instance. The propriety of a constitutional issue being before this Court does not depend, as respondents would have it, upon that issue having been drawn in question "by the decisions of the courts below." Such propriety, at least with reference to state court decisions here on certiorari,[1] depends instead upon two factors (see 28 U.S.C. § 1257):

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[1] What is said herein relates primarily to No. 210, which is here on writ of certiorari to the Appellate Division of the New York Supreme Court. The jurisdictional necessity of a federal constitutional claim having been raised and necessarily decided is one that adheres to cases here on appeal or certiorari from state courts. 28 U.S.C. § 1257. No such jurisdictional requirement is mandated as to cases here on certiorari from federal courts of appeals, as is No. 290. See 28 U.S.C. § 1254. This Court's jurisdiction over judgments of lower federal courts is plenary, though the failure to raise an issue or the absence of a decision on the point involved may affect the exercise of the Court's discretion in granting or denying certiorari.

(1) The federal constitutional validity of the state law provisions must have been drawn in question in the courts below *by the protesting party.* Federal issues are raised by parties, not by the courts. In other words, "if a party intends to invoke for the protection of his rights the Constitution of the United States . . . he must so declare; and unless he does so declare 'specially' that is, unmistakably, this Court is without authority to re-examine the final judgment of the state court." *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655.

(2) The decision below must necessarily have invoked a resolution of the constitutional issue. But "it is not necessary that the ruling shall have been put in direct terms," as was said in *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67. "If the necessary effect of the judgment has been to deny the claim, that is enough." *Ibid.*[2]

The first of these factors has been conceded by the respondents, who have acknowledged (Brief, p. 14) that the petitioner "persistently asserted" in the courts below that the employment forfeiture provisions in question were invalid under the federal Constitution. Such a raising of the federal question below completely distinguishes the cases relied upon by respondents, *Musser* v. *Utah,* 333 U.S. 95; *Adler* v. *Board of Education,* 342 U.S. 485, where this Court declined consideration of federal issues which had not

[2] A denial of the federal claim is jurisdictionally essential only as to cases here on appeal from state court judgments involving the validity of state statutes. See 28 U.S.C. § 1257(2). If such cases come here by certiorari, it matters not whether the state statute was held valid or invalid in light of the federal claim. See U.S.C. § 1257(3).

been properly presented by the parties in the lower courts.

The second factor—the necessary involvement of the federal question in the decision below—is equally satisfied in these cases. There is no claim, and indeed no basis for assuming, that the decisions below in any way rested upon an adequate state law ground. Reliance upon this Court's decision in *Regan* was in itself a federal ground of decision. But, more importantly, the refusal to decide the properly raised federal constitutional question on the theory that the *Regan* decision made such a resolution unnecessary in no way detracts from this Court's jurisdiction to decide the constitutional issue. If reliance on *Regan* was unfounded and if the Constitution protects the petitioner from the coercive impact of the state law provisions in question, "his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282; and see *Greene* v. *Louisville & Interurban R. Co.*, 244 U.S. 499, 508; *Smith* v. *Cahoon*, 283 U.S. 553, 564. See also *Atchison R. Co.* v. *Public Utilities Commission*, 346 U.S. 346, 349.

Thus the constitutional question as to which this Court granted certiorari was inescapably involved in the decisions below despite the failure to resolve the properly raised contention. That very failure operated to deny petitioner's claimed constitutional rights. And, in the circumstances of these cases, it becomes appropriate for this Court to adjudicate this constitutional matter forthwith. That matter relates to the effect of the state law provisions on the free assertion of the federally-protected privilege against self-in-

crimination. The nature and scope of those provisions, providing for employment forfeiture should a public employee refuse to sign a waiver of immunity, are obvious on their face. No state court elaboration of their thrust could make their intendment any plainer. Indeed, the highest New York court has already interpreted these provisions to mean that "the assertion of the privilege against self incrimination is equivalent to resignation," *Daniman* v. *Board of Education*, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377, and this Court has accepted that interpretation as authoritative, *Slochower* v. *Board of Education*, 350 U.S. 551, 554.

Any abstention by this Court at this juncture, pending a remand to the state courts for a resolution of the constitutional issue, would appear both unnecessary and unproductive in these circumstances. The sole constitutional question is whether these employment forfeiture provisions unduly infringe upon the freedom to assert or waive the federal privilege against self-incrimination. As to that issue this Court is necessarily the final arbiter. Nothing that the state courts could now say would make the issue any plainer or the task of this Court any lighter; to remand what has already been prolonged through three contempt proceedings would only delay unnecessarily the day of this Court's determination of an obviously important constitutional question—one that has been fully briefed by the parties in the instant cases.

The circumstances being what they are, this Court may appropriately proceed to resolve the constitutional question without further delay. See *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 302; *Griffin* v. *School Board*, 377 U.S. 218, 229; *Konigsberg* v. *State Bar*, 353 U.S. 252, 258; *Staub* v. *City of Baxley*, 355 U.S. 313.

2. The Regan Decision, Being Premised on the Availability of an Automatic Immunity That Is No Longer in Existence Under New York Law, Is Not Controlling Here

This Court's decision in the *Regan* case, which the lower courts thought to be dispositive of the instant ones, was expressly premised upon the availability of the immunity provided by § 381 of the New York Penal Law "as it existed at the time of this case." 349 U.S. at 59. At that time, § 381 provided unconditionally that no person testifying in a proceeding relating to bribery "shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence. . ." That statutory provision, which was said to be "crucial in this case," 349 U.S. at 62, enabled this Court to conclude that even though the waiver be deemed invalid "the immunity from prosecution persists, and in the presence of such immunity petitioner's testimony could not possibly be self-incriminatory," 349 U.S. at 64.

But as this Court noted in *Regan,* 349 U.S. at 59, n. 2, § 381 was amended after the occurrence of the operative events in that case. So significant is the change in the immunity statute as to make the *Regan* decision totally inapplicable here.

Respondents seek to characterize the change wrought in New York law as "wholly without constitutional significance," being limited to a new requirement that the witness interpose a refusal to testify "before immunity may be conferred by a direction to answer." Brief, p. 24. Such is not the case. As the *amicus curiae* brief filed herein by the Superior Officers Council of the New York City Police Department

points out, the 1953 amendment to § 381 and the new § 2447 that was enacted at that time make the following constitutionally significant changes in the New York immunity scheme:

(1) Section 381 now provides that in any bribery investigation "the court, magistrate or grand jury or the committee, *may* confer immunity in accordance with the provisions" of § 2447 (Emphasis added). There is thus no absolute or automatic immunity attaching to the witness who testifies; the word "may" indicates that the immunity is discretionary with the governing body.

(2) Section 2447 provides that an investigating grand jury is among those "authorized to confer immunity" in a proceeding relating to bribery. But several procedural steps must be taken under the section[3] before such immunity is conferred: (a) the witness must refuse to answer on the ground of possible self-incrimination; (b) the grand jury must then be "expressly requested by the prosecuting attorney to order such person to . . . answer"; (c) the grand jury must then order the person to answer; (d) the witness must then comply with the order to answer; and (e) thereupon "immunity shall be conferred upon him."

In short, as the New York Court of Appeals held in *People* v. *Laino,* 10 N.Y. 2d 161, 172, 218 N.Y.S. 2d 647, 656, the defendant, merely by testifying, no longer receives "automatic immunity for all time, as

[3] Subsection 4 of § 2447 provides that immunity cannot be conferred on any person "except in accordance with the provisions of this section."

to 'any transaction, matter or thing' revealed by him, as he would have prior to the enactment of section 2447 of the Penal Law." To achieve complete immunity under the new statutory scheme, there must be "strict compliance with the procedural requirements" of § 2447. *Ibid.*

A statute that gives no automatic and unconditional immunity, of course, is a far cry from the constitutional premise of an effective immunity statute—one that affords "absolute immunity against future prosecution for the offense to which the question relates." *Counselman* v. *Hitchcock,* 142 U.S. 547, 586; and see *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70.[4] And this selective or conditional immunity established by the amended § 381 and the new § 2447 is radically different from the automatic immunity conferred by the original § 381 in effect at the time Regan would have testified. Because and only because of that automatic immunity, which required no procedural preconditions, this Court was able to say in *Regan* that had Regan actually testified and had the waiver later been found to be invalid, his immunity would have been automatically established by virtue of the then § 381.

Obviously, such was not the case with petitioner. Had he gone ahead and testified and had it been established on a later prosecution that his waiver of immunity was invalid, petitioner would have been bereft of any immunity under the present New York statutory scheme. For complete immunity to have attached,

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[4] As to the ineffectiveness of an immunity conferred in the discretion of a court or prosecutor, in the absence of an absolute immunity statute, see *United States* v. *Ford,* 99 U.S. 594; *Isaacs* v. *United States,* 256 F. 2d 654, 661 (C.A. 8).

there would have had to be strict compliance with all the procedural requirements of § 2447 *at the time of the grand jury investigation* and both the prosecutor and the grand jury *at that time* would have had to be favorably disposed to granting immunity in return for the answers to the incriminating questions.

As detailed more fully in petitioner's main brief (pp. 27-29), the situation at the time of questioning petitioner was such as to preclude compliance with § 2447; the prosecutor and the grand jury had no thought of conferring immunity on petitioner. The whole atmosphere was one of holding petitioner to his waiver of immunity and insisting that he had lost any and all immunity from prosecution for matters revealed by any testimony he might give. As a result, the prosecutor made no effort to bring § 2447 into operation by expressly requesting the grand jury to order petitioner to answer; nor did the grand jury then order petitioner to reply to the incriminating question. And there is no basis for assuming that the grand jury in these circumstances would have been disposed to grant immunity with respect to any answer petitioner might then have given. The only complete immunity which New York law authorizes was never permitted to mature. Not having come into being at the time of the grand jury hearings, the immunity could not later attach so as to protect petitioner from a subsequent prosecution.

Thus the essential crutch of the *Regan* rationale—the absolute assurance that Regan would have received immunity had he testified—is completely absent here. Indeed, the failure of the prosecutor to establish the preconditions of immunity in accordance with § 2447 only confirms petitioner's thesis, developed in his main

brief (pp. 27-31), that the whole conduct of the grand jury procedure was inconsistent with any intent or belief or possibility that the New York immunity statute was applicable. As in *Raley* v. *Ohio*, 360 U.S. 423, petitioner received the type of treatment he would have been given had there been no immunity statute whatever in New York. The confusing entrapment which marked the *Raley* case, causing the defendants to believe there was no state immunity statute, finds a parallel here: petitioner was led to believe that no immunity whatever was possible by virtue of the waiver and yet that he could still "at any time" invoke his federal privilege against self-incrimination.

Respondents attempt (Brief, p. 28) to distinguish *Raley* by the unsupportable allegation that the petitioner herein was "punished for his stubborn adherence to a claimed privilege which he was explicitly and repeatedly told was unavailable." The record, however, plainly reveals that the Assistant District Attorney again and again told petitioner that he could "at any time" invoke his federal privilege against self-incrimination. See 210 R. 9-10, 13; 290 R. 13-14, 25-26, 29; these statements of the prosecutor are quoted in petitioner's main brief at pp. 7, 8, 27, 28. And on a fair and honest reading of this record, the *Raley* case is indistinguishable in terms of the unfair entrapment imposed on the respective witnesses.

The sum total of the factual situation and the drastic change in the statutory immunity provisions compels the conclusion that the *Regan* rationale—quite apart from the constitutional change wrought by *Malloy* v. *Hogan*—cannot be applied to dispose of these cases.

3. The Destruction of Petitioner's Freedom to Choose Between Speaking or Remaining Silent Renders Unconstitutional the Employment Forfeiture Provisions in Question

Respondents' answer to the critical constitutional question under review is that the requirement that a public employee answer pertinent questions concerning the performance of his duties, on pain of losing his job, is a fair and reasonable condition of continued public employment. Any distinction to be drawn in assessing that condition as between the assertion of the privilege against self-incrimination, the imputation of guilt or the demonstrated lack of candor is said to be "a semantic exercise only." Brief, p. 35.

Surely, however, this Court was not engaging in "a semantic exercise only" when it ruled in *Slochower* v. *Board of Education*, 350 U.S. 551, that New York could not constitutionally use these employment forfeiture provisions to cause the summary dismissal of a public employee for having invoked the privilege against self-incrimination before a congressional committee. In so ruling, the Court took pains to point out that "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State." 350 U.S. at 559. The Court thus recognized that the freedom of invoking the privilege could have two consequences, one prohibited and the other permissible: (1) New York could not summarily discharge Slochower for freely invoking the privilege, but (2) upon proper procedures, New York might be able to discharge Slochower for having acted in a manner inconsistent with some legitimate state interest. Such a

distinction, however, involves something far more fundamental than "a semantic exercise only."[5]

What concerned the Court in *Slochower* was the summary fall of "the heavy hand" of these provisions on public employees merely for freely exercising their constitutional privilege, "the full enjoyment of which every person is entitled to receive." 350 U.S. at 558. And so in the instant cases, "the heavy hand" of the provisions fall summarily on public employees precisely at the point when they are confronted with the constitutionally protected choice of speaking or remaining silent. By threat of the use of the summary aspects of those provisions, the State destroys the "unfettered exercise of his own will" which constitutionally must accompany that choice. And the alternatives are thereby significantly changed. Instead of the choice being freely exercisable between speaking or invoking the privilege, the forced choice is between the waiver of the right to remain silent and the loss of one's job immediately upon invocation of the privilege. There is no real freedom in being compelled to make such a "choice," particularly since *Slochower* has already outlawed the summary dismissal aspects of the "choice." But despite that outlawry, New York continues to use the threat of employment forfeiture, and indeed makes good on the threat, to circumscribe the freedom of choice available to the public employee confronted with an incriminating question. And New York is implementing that threat with criminal contempt proceed-

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[5] And this Court was not engaged in "a semantic exercise only" when it repeated the *Slochower* distinction in *Beilan* v. *Board of Education*, 357 U.S. 399, 408-409; and see *Lerner* v. *Casey*, 357 U.S. 468, 476-477.

ings for those who insist on invoking their federal privilege.

As respondents have indicated (Brief, p. 32), lower New York courts have heeded the *Slochower* ruling by ordering the reinstatement of police officers summarily dismissed for having refused to sign waivers of immunity in grand jury investigations. *Gardner* v. *Murphy*, 46 Misc. 2d 728, 260 N.Y.S. 2d 739; *Conlon* v. *Murphy*, 263 N.Y.S. 2d 360. They have done so on the theory that New York law, by force of the *Slochower* decision, must be read as requiring a full due process hearing and opportunity to explain as a predicate to dismissal. But that development in New York law cannot disguise the critical fact that the threat of summary dismissal—which remains explicit on the face of Section 1123 of the City Charter and Article 1, Section 6, of the State Constitution—is still being used to destroy the freedom in the first instance to invoke or waive the federal privilege against self-incrimination. Petitioner's experience stands as mute testimony of that fact.

The constitutional and charter provisions in question must accordingly be deemed invalid under the Fourteenth Amendment by virtue of their burden and restriction upon the freedom surrounding the invocation of the federal privilege against self-incrimination. Such a conclusion, to repeat, does not call into question the right of the State of New York to impose penalties, pursuant to procedural due process, upon those of its public servants who refuse to cooperate with lawful investigations into their public duties. All that New York is here proscribed from doing is encumbering the invocation of the federal privilege with threats of employment forfeiture and criminal contempt citations so as to force the public employee to waive the privilege.

Once the employee has been given complete freedom to speak or remain silent, which includes an awareness that some form of penalties may later be imposed if he invokes the privilege, it will be time to assess the constitutional power of New York, in the light of *Malloy* v. *Hogan,* to discipline or discharge the employee for having freely elected to remain silent.

There is nothing unique about a state's "internal managerial functions" in ferreting out "abuse among its own agents," as respondents would have it (Brief, p. 16), that justifies a state in discriminating against its employees in their assertion of a federal privilege. Just the contrary of respondents' position was established by *Wieman* v. *Updegraff,* 344 U.S. 183, and its progeny. And whatever power a state may have to compel the forfeiture of a constitutional right as a condition of public employment, that power is certainly exceeded when used to jail those employees who have sought freely to invoke a federal privilege.

The focus of these cases is upon the freedom that must surround the decision of a citizen to speak or remain silent when asked an incriminating question. At the point of making that decision, every person—every public servant, every policeman—must be accorded the right to make a choice "in the unfettered exercise of his own will." *Malloy* v. *Hogan,* 378 U.S. 1, 8. To threaten employment forfeiture and contempt citation if the employee does not waive his federal privilege is to destroy that essential freedom. Therein lies the constitutional defect of the legislation in issue.

CONCLUSION

For these reasons, supplementing those advanced in petitioner's main brief, the judgments below should be reversed.

Respectfully submitted,

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